

(11)
No. 92-1500

Supreme Court, USA
FILED

SEP - 1 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PAUL CASPARI, Superintendent of the
Missouri Eastern Correctional Center,
and JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
Petitioners,
v.

CHRISTOPHER BOHLEN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF ON THE MERITS

RICHARD H. SINDEL
(Counsel of Record)
SINDEL & SINDEL, P.C.
8008 Carondelet, Suite 801
St. Louis, Missouri 63105
(314) 721-6040
Counsel for Respondent

BEST AVAILABLE COPY

45 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE DOUBLE JEOPARDY CLAUSE DENIES THE PROSECUTION A SECOND SENTENC- ING ENHANCEMENT HEARING IF THERE WAS A FAILURE OF PROOF AT THE FIRST SENTENCING ENHANCEMENT HEARING..	4
II. THE APPLICATION OF THE PRINCIPLES OF <i>BULLINGTON v. MISSOURI</i> AND <i>BURKS</i> <i>v. UNITED STATES</i> TO A NON-CAPITAL SENTENCING ENHANCEMENT PROCEED- ING WAS NOT A NEW RULE UNDER <i>TEAGUE v. LANE</i>	20
III. PETITIONER AND AMICI HAVE ESTAB- LISHED NO REASON SUFFICIENT TO JUS- TIFY OVERRULING <i>BULLINGTON v. MIS-</i> <i>SOURI</i>	26
CONCLUSION	32
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Abney v. United States</i> , 431 U.S. 651 (1977)	11, 30
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1983)	26
<i>Arizona v. Washington</i> , 434 U.S. 497 (1978)	12, 15, 25
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969)	24
<i>Bohlen v. Caspari</i> , 979 F.2d 109 (1993)	2, 8
<i>Breed v. Jones</i> , 421 U.S. 519 (1975)	11, 30
<i>Briggs v. Procunier</i> , 764 F.2d 368 (5th Cir. 1985) ..	23
<i>Bullard v. Estelle</i> , 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 459 U.S. 1139 (1983) ..	23
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	passim
<i>Burks v. United States</i> , 437 U.S. 1 (1978)	passim
<i>Butler v. McKellar</i> , 494 U.S. 407 (Brennan, J., dis- senting)	22, 23, 25
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973)	6
<i>Crist v. Betz</i> , 438 U.S. 28 (1978)	25
<i>DiFrancesco</i> , 449 U.S. 149-150	9
<i>Downum v. United States</i> , 372 U.S. 734 (1963)	15
<i>Durosoko v. Lewis</i> , 882 F.2d 357 (9th Cir. 1989), cert. denied, 110 S. Ct. 1930 (1990)	23
<i>French v. Estelle</i> , 692 F.2d 1021 (5th Cir. 1982) cert. denied, 461 U.S. 937 (1983)	23
<i>Furman v. Georgia</i> , 408 U.S. 238 (1976)	26, 31
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	26
<i>Graham v. Collins</i> , 113 S. Ct. 892 (1993)	23
<i>Green v. United States</i> , 355 U.S. 184 (1957)	passim
<i>Jackson v. United States</i> , 390 U.S. 570 (1968)	31
<i>Jeffers v. United States</i> , 432 U.S. 137 (1977)	18
<i>Johnson v. Howard</i> , 963 F.2d 342 (11th Cir. 1992) ..	24
<i>Lockhart v. Fretwell</i> , 113 S. Ct. 838 (1993)	21
<i>Lockhart v. Nelson</i> , 430 U.S. 33	23
<i>Lockhart v. Nelson</i> , 488 U.S. 33 (1988)	19
<i>McIntyre v. Trickey</i> , 938 F.2d 899 (8th Cir. 1991), vacated on other grounds, 112 S. Ct. 1658 (1992), on remand, 975 F.2d 437 (1992), peti- tion for cert. filed, 61 U.S.L.W. 3653 (U.S. March 10, 1993)	24
<i>Nelson v. Lockhart</i> , 828 F.2d 446 (8th Cir. 1987) reversed on other grounds, 488 U.S. 33 (1988)	23
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969)	6, 24, 31
<i>Ohio v. Johnson</i> , 467 U.S. 493 (1984)	11

TABLE OF AUTHORITIES—Continued

	Page
<i>Palko v. State of Connecticut</i> , 302 U.S. 328	30
<i>Parke v. Raley</i> , 506 U.S. —, 113 S. Ct. 517 (1992)	8
<i>Penry</i> , 492 U.S. at 330	24
<i>Planned Parenthood v. Casey</i> , 112 S. Ct. 2791 (1992)	28, 31
<i>Poland v. Arizona</i> , 476 U.S. 147 (1986)	passim
<i>Robinson v. Neil</i> , 409 U.S. 505 (1973)	24
<i>Rummell v. Estelle</i> , 445 U.S. 263 (1980)	16
<i>Saffle v. Parks</i> , 494 U.S. 484 (1990)	20
<i>Serfass v. United States</i> , 420 U.S. 377 (1975)	11
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140 (1986)	20
<i>Specht v. Patterson</i> , 386 U.S. 608 (1967)	13
<i>State ex rel. Westfall v. Mason</i> , 594 S.W.2d 908 (1980)	22
<i>State v. Bohlen</i> , 670 S.W.2d 119 (Mo. App. 1984) ..	2, 8, 18
<i>State v. Deutschmann</i> , 392 S.W.2d 279 (Mo. 1965)	21
<i>State v. Fitzpatrick</i> , 676 S.W.2d 831 (Mo. banc 1984)	14
<i>State v. Garrett</i> , 416 S.W.2d 116 (Mo. 1967)	21
<i>State v. Harris</i> , 547 S.W.2d 473 (Mo. banc 1977) ..	18, 21
<i>State v. Hawkins</i> , 418 S.W.2d 921 (Mo. banc 1967)	21
<i>State v. Hill</i> , 371 S.W.2d 278 (Mo. 1963)	18
<i>State v. Holt</i> , 660 S.W.2d 735 (Mo. App. 1983)	21
<i>State v. Lee</i> , 660 S.W.2d 394 (Mo. App. 1983)	21
<i>State v. Quinn</i> , 594 S.W.2d 599 (Mo. App. 1980)	14
<i>State v. Tettamble</i> , 450 S.W.2d 191 (Mo. 1970)	21
<i>Stringer v. Black</i> , 112 S. Ct. 1130 (1992)	23
<i>Stroud v. United States</i> , 251 U.S. 15 (1919)	5, 6
<i>Swisher v. Brady</i> , 438 U.S. 204 (1978)	14, 18
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	20, 23, 25
<i>Tibbs v. Florida</i> , 457 U.S. 31 (1982)	11, 14, 25
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	26
<i>United States ex rel. Hetenyi v. Wilkins</i> , 348 F.2d 844 (2d Cir. 1965) cert. denied, 383 U.S. 913 (1966)	11, 30
<i>United States v. Ball</i> , 163 U.S. 662 (1896)	18

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. DiFrancesco</i> , 449 U.S. 117	<i>passim</i>
<i>United States v. Dixon</i> , 113 S. Ct. 2849 (1993)	5, 28
<i>United States v. Jorn</i> , 400 U.S. 470 (1971)	11, 19
<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 564 (1978)	18
<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 567 (1977)	11
<i>United States v. Scott</i> , 437 U.S. 82 (1978)	<i>passim</i>
<i>United States v. Tateo</i> , 377 U.S. 463 (1964)	19
<i>United States v. Wilson</i> , 420 U.S. 322 (1975)	25
<i>United States v. Wilson</i> , 420 U.S. 332 (1975)	19, 22
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	8
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	30

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	<i>passim</i>
U.S. Const. amend. VII	<i>passim</i>

STATUTES

18 U.S.C. § 3575 (e) and (f)	8
18 U.S.C. § 3576	8
Mo. Const. art. I § 18 (a)	17
Mo. Rev. Stat. § 547.200.1 (1986)	18
Mo. Rev. Stat. § 547.210 (1986)	18
Mo. Rev. Stat. § 557.036.2	17
Mo. Rev. Stat. § 558.021 (Supp. 1981)	<i>passim</i>
Mo. Rev. Stat. § 565.006	<i>passim</i>
Mo. Rev. Stat. § 565.008	4, 6
Mo. Rev. Stat. § 565.012	4, 6, 16

TREATISES

W. Blackstone Commentaries (1769)	25
---	----

MISCELLANEOUS

Bennet, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor. 19 N.M.L. Rev. 451 (1989)	29
--	----

TABLE OF AUTHORITIES—Continued

	Page
Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13	27
Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81, n.3	11, 19
Westen, The Three Faces of Double Jeopardy, 78 MICH. L. REV. 1000, 1004 (1980)	18, 19

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1500

PAUL CASPARI, Superintendent of the
Missouri Eastern Correctional Center,
and JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
v. *Petitioners,*

CHRISTOPHER BOHLEN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

RESPONDENT'S BRIEF ON THE MERITS

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb."
2. The Eighth Amendment provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
3. The relevant portions of Mo. Rev. Stat. §§ 565.001, 565.006, 565.012, and 557.036 (1978) are reproduced in the Appendix, *infra*, 1a-6a.

STATEMENT OF THE CASE

Respondent adopts, with the following important exceptions, Petitioner's Statement of the Case.

Petitioner mischaracterizes the basis for the state appellate court's initial remand on direct appeal. *See State v. Bohlen*, 670 S.W.2d 119 (Mo. App. 1984) (A-63). The case was remanded *not* because the trial court failed to perform some ministerial act, e.g., "made no findings of fact," (Brief for Petitioner, hereinafter Pet. Br. 7) but because there was "no proof made of the prior convictions." *State v. Bohlen*, 670 S.W.2d at 123. (A-73).

Petitioner also misstates the basis for the reversal by the United States Court of Appeals for the Eighth Circuit. That Court did *not* hold "that respondent's double jeopardy rights had been violated by the Missouri Court of Appeals' remand of the case to the circuit court for a *determination* of respondent's prior and persistent offender status." (Pet. Br. 8) (emphasis added). Rather, the Court of Appeals recognized that, when there has been a "total failure of proof," the state has "received 'one fair opportunity to offer whatever proof it could assemble,' . . . [and] 'is not entitled to another.'" *Bohlen v. Caspari*, 979 F.2d 109, 115 (1993).

SUMMARY OF THE ARGUMENT

POINT I

From its earliest days, the concept of double jeopardy or *autrefois acquit* has protected an accused, who has been convicted from being retried. This protection preserves the finality of judgments, the defendant's interest in repose, and the unqualified right of the factfinder to determine the strengths and failings of the State's case beyond a reasonable doubt. The State now seeks to nullify those findings because, through neglect, it failed to present evidence to support the distinct issue of Bohlen's

recidivist status at his trial. The trial court, pursuant to controlling statutes, was required to find and determine at a proceeding that had all the "hallmarks of a trial," Respondent's status and eligibility for sentence enhancement. The State's failure to muster the evidence sufficient to establish the required facts and the state appellate court's determination of evidentiary insufficiency must be afforded the same constitutional protection as has always been granted verdicts of acquittal, whether expressed or implied. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

The State had been granted its one full and fair opportunity to prove Bohlen's status as a persistent offender. Failure to produce the evidence to justify such a finding precludes them from a second attempt.

POINT II

Because the decision in *Bohlen v. Caspari*, was dictated by the holdings in *Burks v. United States*, 437 U.S. 1 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1981), it did not announce a new rule and Respondent is entitled to benefit from the prevailing law at the time his conviction became final. The state appellate court failed in any meaningful way to distinguish its holding from the decision in *Bullington*, relying instead on rulings from the state supreme court that preceded this Court's holding in *Bullington*. Furthermore, *Bohlen* falls within the two exceptions enunciated in *Teague*. The proper application of the Double Jeopardy Clause to Bohlen's situation precludes a second sentencing trial and deprives the State of the opportunity to punish him as recidivist. The failure to present evidence at the first trial, the main event, forever renders him ineligible for sentencing enhancement in this case. Secondly, the Double Jeopardy Clause is a bedrock procedural protection implicit in the concept of ordered liberty whose protections have been recognized as necessary to secure accurate and fair factual determinations of guilt.

POINT III

Petitioner and Amici have failed to demonstrate any compelling need or justification that would warrant the exceptional action of overruling the Court's decision in *Bullington*. Petitioner has not proved the application of the holding in *Bullington* unstable or confusing. Countless capital defendants presently rely on its holding to insulate them from repeated attempts on their lives if they happen to succeed in obtaining reversals of their convictions. In addition, *Bullington* acts as an appropriate restraint on prosecutorial overreaching at the initial trial. *Bullington* remains a viable, well-reasoned and altogether appropriate application of the principles of the Double Jeopardy Clause.

Finally, this case, because it does not have life or death implications, is not the appropriate vehicle for this Court to reexamine the holding in *Bullington*.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE DENIES THE PROSECUTION A SECOND SENTENCING ENHANCEMENT HEARING IF THERE WAS A FAILURE OF PROOF AT THE FIRST SENTENCING ENHANCEMENT HEARING

The statutes of the State of Missouri "explicitly require[] the [factfinder] to determine whether the prosecution has proved" at a trial-like proceeding that a capital defendant has met the legislative criteria for death.¹ *Bullington v. Missouri*, 451 U.S. 430, 444 (1981) (emphasis in original). At Bullington's sentencing trial, the jury assessed his punishment at life. When Bullington was granted a new trial the State announced its intention to seek the death penalty a second time. The Court ruled

¹ At the time *Bullington* was tried Mo. Rev. Stat. §§ 565.006, 565.008 and 565.012 controlled the bifurcated trial proceeding. (Appendix). There have been no substantial changes or modifications of these procedures since 1977.

that the jury determination of a life sentence in a proceeding that closely resembled a trial foreclosed the State from attempting a second time to procure a sentence of death. The Court concluded that Bullington's acquittal of the State's case for death was entitled to the protections of the Double Jeopardy Clause because the sentencing proceeding² had the "hallmarks of the trial on guilt or innocence," such as the opportunity for counsel to make opening statements, the presentation of testimony and evidence, jury instructions (if the case is tried by a jury³), the opportunity for counsel to argue their respective positions, and deliberations. *Id.* at 438-439 n.10. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." *Bullington*, 451 U.S. at 438.

The Court distinguished *Bullington*'s situation from its previous holding in *Stroud v. United States*, 251 U.S. 15 (1919), because of the significant differences in the trial-like aspects at Bullington's sentencing from the unitary proceedings utilized in *Stroud*, and the statutory requirements that limited the fact-finder's discretion by requiring that certain elements be proved beyond a reasonable doubt; "[i]n *Stroud*, no standards had been enacted to guide the jury's discretion." *Bullington*, 451 U.S. at 439, 446. The statutory scenario for determining Bohlen's status as a repeat offender is no different.

A comparison of the sentencing enhancement statutes with the capital sentencing statutes illustrates their parallel

² Application of the Clause is not so much the nature of the proceeding as it is the legal consequences that flow from it. For example, the Court has held that the protection of the Double Jeopardy Clause attaches to nonsummary criminal contempt prosecutions just as it does in criminal prosecutions. *United States v. Dixon*, 113 S.Ct. 2849 (1993).

³ In Missouri the sentencing trial and the guilt/innocence trial can be by judge or jury. See Mo. Rev. Stat. § 565.006.1 (1977).

applications.⁴ In Missouri, to enhance a defendant's sentence: (i) the State must give notice of its intent to so proceed by the filing of an indictment or information that "pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender," Mo. Rev. Stat. § 558.021.1.(1) *compare* Mo. Rev. Stat. § 565.006.2 ("Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible."); (ii) the State must prove that the defendant has been convicted of at least one felony beyond a reasonable doubt, § 558.021.1.(2), *compare* § 565.012.4 (the prosecutor must prove the elements of his case and the defendant's status as one worthy of the death penalty beyond a reasonable doubt); and (iii) the factfinder, after deliberation, must make findings of fact that enhanced offender status is warranted, § 558.021.1.(3), *compare* § 565.012.4. ("The jury, if its verdict is a recommendation of death, shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt."). The features of the enhancement trial are virtually identical to the proceedings the Court held were sufficiently "unique" to require departure from its previous holdings⁵ and apply the protections of the Double Jeopardy Clause when the State fails to prove its case. *Bullington*, 451 U.S. at 441-442 n.15.

⁴ All statutory references hereafter are to the enhancement statutes in effect at the time of Bohlen's trial (Mo. Rev. Stat. § 558.021 (Supp. 1981)) and to the capital sentencing statutes in effect at the time *Bullington* was tried (Mo. Rev. Stat. §§ 565.006, 565.008, and 565.012 (1977)).

⁵ Prior to *Bullington*, the Court declined to hold that a life sentence imposed at a defendant's first capital trial barred the imposition of the death sentence at a retrial following appellate reversal of his first conviction (*Stroud v. United States*, 251 U.S. 15 (1919)). More recently the Court has held that the Double Jeopardy Clause generally does not forbid the imposition of a longer prison sentence following retrial. *North Carolina v. Pearce*, 395 U.S. 711, 719-721 (1969); *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 (1973).

"In *Pearce*, *Chaffin*, and *Stroud*, there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify a particular sentence. In each of these cases, moreover, the sentencer's discretion was essentially unfettered." *Bullington*, 451 U.S. at 439. In this case, as in *Bullington*, the factfinder's determination of defendant's status as a previous offender was not unfettered and a factual predicate must be established and decided utilizing procedures that afford him all the fundamental constitutional rights guaranteed him at his trial on guilt or innocence.⁶

Whether Bohlen meets the statutory criteria to accord him the status of a persistent offender is an inherently and fundamentally different decision from a sentencing determination of a term of years of incarceration. The first is the choice between two alternatives—guilty or not guilty of being a persistent offender—while the latter is a line-drawing decision on a continuous spectrum containing numerous possibilities. *Bullington*, 451 U.S. at 440-441. The sentencing in *Pearce* and *Chaffin* involved a decision as to where to draw a somewhat arbitrary line from a large number of alternatives. Deciding *Bullington*'s and Bohlen's status, however, is the stark either/or, yes/no, proved/not proved, guilt/acquittal, finding of objective fact that the factfinder is charged with making in all criminal cases. That Bohlen's status must be proved beyond a reasonable doubt substantiates his claim for finality because "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment [O]ur society imposes almost the entire risk of error upon itself." *Bullington*, 451 U.S. at 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424 (1979)).

⁶ "The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at [the sentencing] hearings." Mo. Rev. Stat. § 558.021.4 (1981).

A trial judge is not charged with selecting a sentence of a term of years beyond a reasonable doubt. There is no legal burden on the State to prove, nor upon the sentencer to arrive at, the correct punishment. When faced with a wide range of punishment possibilities across a broad spectrum of available alternatives, this Court has not applied the strictures of the Double Jeopardy Clause. Bohlen's complaint does not emanate from a determination of how long a prison sentence is appropriate for him and the crime he was convicted of committing (as was the situation in *Williams v. New York*, 337 U.S. 241, 248 (1949)), but rather from the determination of his status as a persistent offender absent *any*⁷ evidence⁸ to support such a finding.

It is this yes/no fact-driven determination of status that is the common thread that links *Bullington* with its progeny and distinguishes it from those cases in which the Court has found its holding inapplicable. In *United States v. DiFrancesco*, 449 U.S. 117 (1980), the Court upheld the government's statutory right to appeal a sentence imposed upon a federal defendant found by the District Court to be a "dangerous special offender."⁹ At Di-

⁷ "We emphasize that . . . this is not a case of trial error, but a total failure of proof." *Bohlen v. Caspari*, 979 F.2d 109, 115 (8th Cir. 1992) (A-22).

⁸ The State cannot contend, as it did in its argument below, that the transcript simply fails to reveal what had occurred or that this Court should presume that such a proceeding took place. No "presumption of regularity" attached to the proceedings in the sentencing court nor did the Petitioner seek to prove at an evidentiary hearing, by affidavit or otherwise, that there was a hearing of any sort during Bohlen's trial. "This is . . . a case in which an extant transcript is suspiciously 'silent' on the [relevant] question. . . ." *Parke v. Raley*, 506 U.S. —, 113 S. Ct. 517, 523-524 (1992). Although the Missouri Court of Appeals "requested the parties to supplement the record to *prove* that the prior convictions were presented to the court[,] [n]o such proof was furnished." *State v. Bohlen*, 670 S.W.2d 119, 123 (Mo. App. 1984) (emphasis added), (A-73); *Bohlen v. Caspari*, 979 F.2d at 115 n.7 (A-23).

⁹ 18 U.S.C. § 3575(e) and (f) and 18 U.S.C. § 3576.

Francesco's sentencing hearing the Government introduced evidence, in addition to that adduced at trial, to prove DiFrancesco's previous convictions and his status as a "dangerous special offender." *DiFrancesco*, 449 U.S. at 124. The District Court made specific findings of fact that the Government had proved that defendant was a dangerous special offender but only sentenced defendant to "additional imprisonment . . . [of] one year." *Id.* at 124-125. The government appealed the sentence, *not* the status determination.

DiFrancesco is easily distinguished from the case at bar. First, and primarily, DiFrancesco had properly been found "guilty" of being a dangerous special offender by the trial court; his status as such had been determined after receipt of appropriate evidence. As the Court in *Bullington* pointed out, the record in *DiFrancesco* included the evidence and finding of the sentencing court; it might have been different if the Government had sought "a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington*, 451 U.S. at 440. The Court in *DiFrancesco* said as much: "[T]he Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence[;] * * * It is acquittal that prevents retrial. . . ." *DiFrancesco*, 449 U.S. at 131, 132.

Likewise, in *Poland v. Arizona*, 476 U.S. 147, 148, 157 (1986), the Court ruled that the Double Jeopardy Clause did not bar further capital sentencing proceedings at retrial when the sentencing judge and the reviewing court had *not* found the evidence insufficient to support imposition of the death penalty. In support of this holding the Court stated that "the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case'" *Id.* at 155 (quoting *Bullington*, 451 U.S. at 444).

It is this factor by itself which distinguishes *Poland* from *Bohlen*: *Poland's* status as "death-eligible" had been determined against him. In one sense, he had been found guilty because the trial judge had determined that death was the appropriate penalty. In the instant case, however, as in *Bullington*, "'an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge.'" *Poland v. Arizona*, 476 U.S. at 153 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984)). The "relevant inquiry . . . is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' . . . and hence has acquitted petitioners." *Poland v. Arizona*, 476 U.S. at 154 (quoting *Bullington*, 451 U.S. at 443).

The Court has thus been consistent in this regard: In neither *DiFrancesco* nor *Poland* was the prosecution allowed a second opportunity "to supply evidence which it failed to muster in the first proceeding," *Burks v. United States*, 437 U.S. 1, 11 (1978), "for it ha[d] been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16.

Bohlen does not complain that his sentence, i.e., a term of years of imprisonment, is a violation of the Double Jeopardy Clause but, rather, that the State was allowed a second chance to muster the evidence it failed to produce at his first trial. There is nothing *implied* in Respondent's acquittal; the state appellate court expressly determined that there was "no evidence" to justify any such determination. *Bohlen* had not been proved eligible for application of the sentencing enhancement statutes and the attempt to establish his status at a second trial was unconstitutional.

Petitioner argues that defendant's status as a prior offender rather than the government's failure to prove his status should control. (Pet. Br. 15). In other words, Petitioner contends that if a defendant is actually guilty of a crime but the prosecution fails to prove it, the Double

Jeopardy Clause should have no application and the State should "with all its resources and power . . . be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-188 (1957); see also *Bullington v. Missouri*, 451 U.S. at 445; *Abney v. United States*, 431 U.S. 651, 661 (1977); *Breed v. Jones*, 421 U.S. 519, 529-530 (1975); *Serfass v. United States*, 420 U.S. 377, 388 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971); *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 858 (2d Cir. 1965) (Marshall, J.) *cert. denied*, 383 U.S. 913 (1966).

It is this threat of repeated prosecutions that the Clause protects against. As now Chief Justice Rehnquist noted in *Ohio v. Johnson*, 467 U.S. 493, 497-498 (1984) (citations omitted) (emphasis added):

As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense while increasing the risk of an erroneous conviction *or an impermissibly enhanced sentence*.

Petitioner's argument is an entreaty for the Court to ignore "the most fundamental rule in the history of double jeopardy jurisprudence" (*United States v. Martin Linen Supply Co.*, 430 U.S. 567, 571 (1977)) which is that the law "attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. at 91; Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 n.3.

As the Court in *Tibbs v. Florida* emphasized:

[T]he Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by

the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational fact-finder could have voted to convict the defendant.

457 U.S. 31, 41 (1982) (footnotes omitted).

The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." [citations omitted] If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.

Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)); see also *United States v. DiFrancesco*, 449 U.S. at 129.

That Respondent is in actuality a prior or persistent offender, as that term is defined by Missouri statutes, is of no consequence because "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks*, 437 U.S. at 12, n.6.

The Court addressed the absolute nature of the Double Jeopardy Clause head-on in *United States v. Scott*, 437 U.S. 82, 106-108 (1978) (citations omitted):

[W]hile we have acknowledged that permitting review of acquittals would avoid release of guilty defendants who benefited from "error, irrational behavior, or prejudice on the part of the trial judge," [citations omitted] we nevertheless have consistently held that the Double Jeopardy Clause bars any appellate review in such circumstances. The reason is not that the first trial established the defendant's factual innocence, but rather that the second trial

would present all the untoward consequences the Clause was designed to prevent. Government would be allowed to seek to persuade a second trier of fact of the defendant's guilt, to strengthen any weaknesses in its first presentation, and to subject the defendant to the expense and anxiety of a second trial.

* * * *

[The decision in] *Jenkins* recognized that an acquittal can never represent a determination that the criminal defendant is innocent in any absolute sense; the bar to a retrial following acquittal does not—and indeed could not—rest on any assumption that the finder of fact has applied the correct legal principles to all the admissible evidence and determined that the defendant was factually innocent of the offense charged. The reason further prosecution is barred following an acquittal, rather, is that the Government has been afforded one complete opportunity to prove a case . . . and, when it has failed for any reason to persuade the court not to enter a final judgment favorable to the accused, the constitutional policies underlying the ban against multiple trials become compelling. Thus *Jenkins* and *Lee* recognized that it mattered not whether the final judgment constituted a formal "acquittal." What is critical is whether the accused obtained, after jeopardy attached, a favorable termination of the charges against him. If he did, no matter how erroneous the ruling, the policies embodied in the Double Jeopardy Clause require the conclusion that "further proceedings . . . devoted to the resolution of factual elements of the offense charged" are barred.

The determination that Respondent is a "persistent offender" is a "distinct issue" that requires proof to establish its elements. There is no valid reason for distinguishing the proof of this issue from the proof of any other issue or element in a criminal case. Cf. *Specht v. Patterson*, 386 U.S. 608, 610 (1967) (citations omitted) ("[A]n habitual criminal issue is a 'distinct issue' on

which a defendant must receive notice and an opportunity to be heard.”). The sentencer is charged with determining an objective truth from the facts discovered at the sentencing proceedings. If no evidence is introduced to support the facts that must be found, there can be only one result—acquittal. The answer to this objective factual question cannot be solicited time and time again. Underlying the question of defendant’s status as a persistent offender is an objective truth: Did the State prove his status beyond a reasonable doubt? See *Bullington*, 451 U.S. at 450 (Powell, J., dissenting).

The remand of Respondent for a second sentencing trial allowed the State that which the Double Jeopardy Clause forbids: a “‘second bite at the apple.’” *Burks v. United States*, 437 U.S. at 17. See also *United States v. DiFrancesco*, 449 U.S. at 140 (“Important in the decision [in *Swisher v. Brady*, 438 U.S. 204 (1978)] was the fact that the system did not provide the prosecution a ‘second crack.’”) The prohibition against allowing the prosecution a second opportunity to supply evidence it failed to gather at the initial proceeding is “at the core of the Clause’s protections [and] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts. . . .” *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

Amici feign concern that if the ruling in the court below is upheld it will work to the eventual detriment of defendants in criminal cases because the states will amend their statutes to no longer require proof of prior convictions beyond a reasonable doubt.

Amici’s concern is unfounded. First, the evidence necessary for the State to meet its burden is easy to obtain and present. In the vast majority of cases, the prosecutor merely admits into the record certified records of the previous convictions. *e.g.* *State v. Quinn*, 594 S.W.2d 599, 602 (Mo. App. 1980), that bear the same name as the defendant. *State v. Fitzpatrick*, 676 S.W.2d 831, 838

(Mo. banc 1984). Considering the ease with which the State can meet its burden, it is unlikely that State legislatures will be inclined to drastically change established procedures or that defendants will be seriously affected if the burden is incrementally reduced.

Second, after *Bullington* applied the Double Jeopardy Clause to trial-like sentencing proceedings, there was no rush by the State legislatures to alter or amend their capital sentencing statutes to avoid or circumvent the Court’s holding, precisely because it does not impose a substantial, unfair or inequitable burden on the State to require it to take its best shot the first time around.

No one can claim that the State in this case did not have “one full and fair opportunity” to make its case. “[A]s a general rule, the prosecutor is entitled to one, and only one opportunity to require an accused to stand trial” where the State can “present [its] evidence to an impartial [factfinder].” *Arizona v. Washington*, 434 U.S. at 505. The Double Jeopardy Clause prohibits repeated attempts to prove defendant’s status as a prior offender. Despite Amici’s contentions, it is just as likely that the legislatures will recognize the wisdom in restricting the State’s ability to return to court an infinite number of times in an effort to prove its case.

Amici’s “practical” concerns are hollow; their arguments based on prior law are misleading. Amici’s suggestion that *Scott*, 437 U.S. at 92, focused on the vindication of the public’s interest in seeing that the guilty are punished is misplaced. *Scott* recognized the importance of “balanc[ing] ‘the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him,’ *Downum v. United States*, 372 U.S. 734, 736 (1963), against the public interest in insuring that justice is meted out to offenders.” *Scott*, 437 U.S. at 92. By statute, Bohlen had the right to have the sentencing enhancement trial completed during his

trial for the substantive offense before the case was submitted to the jury.¹⁰

Amici also argue that any extension of the Double Jeopardy Clause in *Bullington* resulted from the Court's determination that

[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Rummell v. Estelle, 445 U.S. 263, 272 (1980) (citing *Furman v. Georgia*, 408 U.S. 238, 306 (1972)). The Court's decision in *Bullington* was, however, *not* grounded in the Eighth Amendment: "Because of our conclusion on the Double Jeopardy Clause issue, we have no occasion to address petitioner's claims under the Sixth, Eighth and Fourteenth Amendment."¹¹ *Bullington* 451 U.S. at 446 n.17. The Court declined to decide the issue in *Bullington*

¹⁰ "In a jury trial, the facts shall be pleaded, established and found prior to the submission to the jury. . . ." Mo. Rev. Stat. § 558.021.2 (1981).

¹¹ In addition to the double jeopardy claim, certiorari was granted on the following Questions Presented for Review:

II. Would a sentence of death be excessive and disproportionate in this case wherein a jury determined that a sentence of life imprisonment without possibility of probation or parole for a minimum of fifty years was the appropriate punishment.

III. Are the applicable sections of Missouri Revised Statutes Section 565.012, et seq.—which permit a jury to impose a death sentence if: (i) the crime is found to be "outrageously or wantonly vile, horrible or inhuman" or (ii) the defendant is believed to have "a substantial history of serious assaultive criminal convictions" facially vague and overbroad?

IV. Is Petitioner's right to trial by jury unconstitutionally chilled by permitting the State of Missouri to seek the penalty of death at Petitioner's retrial, after the jury at his first trial returned a sentence of life imprisonment only?

within the narrow precepts of the Eighth Amendment and thus restrict its application to capital cases.

In a similar vein, Petitioner and Amici claim to believe that a defendant's concern over the length of his prison sentence is *de minimis*, and that any anxiety one experiences relates solely to the guilt/innocent aspect of his trial. The truth is more likely as stated by Justice Brennan in his dissent in *DiFrancesco*, 449 U.S. 149-150:

I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. * * * Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for [allowing the state to retry respondent's status as a persistent offender] is to ignore reality.

The Solicitor General properly notes that defendant's status as a persistent offender did not expose him to additional punishment. This does not end the inquiry. The fact that Bohlen could have received the identical sentence even if he had not been "found" to be a persistent offender is of no consequence. He lost a valuable right to be tried *and* sentenced by a jury. This is a right significant enough to be preserved to him in both Missouri's Constitution and its statutes.¹² Loss of this right to jury sentencing was of such significance that if he had been improperly deprived of this right, his sentence *and* conviction would be reversed and he would have received a

¹² Mo. Const. art. I § 18(a) provides: "That in criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." A defendant has the right to have a jury set the outer limits of his sentence unless he waives it, or his status as a prior, previous or dangerous offender is properly pleaded and proved. Mo. Rev. Stat. § 557.036.2 and § 557.036.3.

new trial. *State v. Bohlen*, 670 S.W.2d at 123 (A-74); see also *State v. Harris*, 547 S.W.2d 473, 476 (Mo. banc 1977) and *State v. Hill*, 371 S.W.2d 278 (Mo. 1963).

Moreover, Bohlen had a right to believe that, once the State failed to present any evidence to support a finding of his status as a persistent offender, he had a legitimate expectation of finality and repose because he could not be returned to court to be retried on an issue on which the State defaulted at the first proceeding.¹³ The state appellate court's remand improperly denied him the finality and repose the Double Jeopardy Clause protects.

The Respondent's reliance on the integrity of the appellate court's finding of evidentiary insufficiency is "fundamental"¹⁴ because it is "absolute."¹⁵ "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Swisher v. Brady*, 438 U.S. at 214 (citing *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978)). Since the turn of the century this guarantee of finality has remained unscathed and continues to be "[t]he very foundation upon which the double jeopardy clause is based" (*United States v. Ball*, 163 U.S. 662, 671 (1896)) and is at the very "heart" of the Double Jeopardy Clause. *Jeffers v. United States*, 432 U.S. 137, 150 (1977) (plurality opinion).

¹³ Missouri law limits the State's right to appeal an "order or judgment which results in: (1) quashing an arrest warrant; (2) suppressing evidence; (3) suppressing a confession or admission" Mo. Rev. Stat. § 547.200.1 (1986); or (4) dismissal of an indictment as insufficient. Mo. Rev. Stat. § 547.210 (1986).

¹⁴ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1978).

¹⁵ *Burks*, 437 U.S. at 16. See also Westen, *The Three Faces of Double Jeopardy*, 78 MICH. L. REV. 1000, 1004 (1980).

The reasons underlying this rule of finality¹⁶ are no less compelling in this case where Respondent seeks to foreclose the State from taking the forbidden "second crack" at his freedom. Bohlen's interest in the finality of his first trial outweighs any interest the State can claim in achieving a "correct" sentence. "[I]n deciding when the double jeopardy bar should apply, we are balancing two weighty interests: the defendant's interest in repose and society's interest in the orderly administration of justice. See, e.g., *United States v. Tateo*, 377 U.S. at 466." *Lockhart v. Nelson*, 488 U.S. 33, 48 (1988) (Marshall, J., dissenting). Bohlen has a valid and compelling interest in being able "to conclude his confrontation with society" once it has begun *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Bohlen had the right to believe that once the State had failed totally to present evidence of his prior convictions to the trial court he would be sentenced by the jury without the possibility of the imposition of an enhanced or

¹⁶ Authorities have postulated various reasons for the application of such an inflexible rule as is accorded to verdicts of acquittal, e.g.: "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may become guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957); "Granting the government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson*, 420 U.S. 332, 352 (1975); or it would allow "the government with [its] vastly superior resources [to] wear down the defendant so that 'even though innocent he may be found guilty.'" *United States v. Scott*, 437 U.S. at 91. Westen, *The Three Faces of Double Jeopardy*, *supra*, 1004-1023; Westen & Drubel, *Toward a General Theory of Double Jeopardy*, *supra*, 122-137.

extended term of imprisonment. His legitimate expectation of finality was thwarted by the incorrectly compelled ruling in the Missouri Court of Appeals because its "reversal . . . translate[d] into further proceedings devoted to the resolution of factual issues" surrounding Bohlen's status as a previous offender. *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986). The opinion of the Court of Appeals for the Eighth Circuit restored this right to him and should be affirmed.

II. THE APPLICATION OF THE PRINCIPLES OF *BULLINGTON v. MISSOURI* AND *BURKS v. UNITED STATES* TO A NON-CAPITAL SENTENCING ENHANCEMENT PROCEEDING WAS NOT A NEW RULE UNDER *TEAGUE v. LANE*

Petitioner and Amici suggest that the Court need not reach the merits in this case because the decision below is not retroactive in that it was not dictated by precedent existing at the time Bohlen's direct appeal rights were exhausted. *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* inquiry is whether the decision by the Federal Court of Appeals is a "new rule" that "breaks new ground," "imposes a new obligation on the States or the Federal Government" or was not "dictated by precedent existing at the time the defendant's conviction became final." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Respondent contends and the court below determined that the decisions in *Burks v. United States*, 437 U.S. 1 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1981), compel the rule that Bohlen seeks. See e.g. *Saffle v. Parks*, 494 U.S. at 488. It is not necessary to repeat the Court of Appeals' careful and thoughtful analysis of the precedents that guided its determination. Suffice it to say, that the decision to grant Bohlen relief flowed naturally and was the inevitable by-product of this Court's decisions in *Burks* and *Bullington*. It was the trial-like character of the sentencing proceedings that distinguished *Bullington* from the holding in *Stroud*, not the

Eighth Amendment implications. Despite substantial arguments¹⁷ to support an Eighth Amendment approach to the resolution of the issues present in *Bullington*, the Court declined to limit its application to the capital arena.

Petitioner argues that the Missouri Court of Appeals' reliance on the earlier decisions in *State v. Holt*, 660 S.W.2d 735 (Mo. App. 1983), and *State v. Lee*, 660 S.W.2d 394 (Mo. App. 1983) (per curiam) evince a "reasonable, good-faith interpretation of existing precedent."¹⁸ *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)). However, the Missouri Court of Appeals in *Holt* never discussed or decided the double jeopardy implications of allowing the State a second opportunity to make its case for recidivist sentencing after it failed to do so in the initial trial. The state court simply "remanded for resentencing in accordance with the persistent offender act." *State v. Holt*, 660 S.W.2d at 730. That the state court ignored or overlooked the double jeopardy issue does not establish "a reasonable, good-faith interpretation" of anything.

Likewise, the appellate court in *State v. Lee*, felt "constrained to follow the procedure on this issue clearly mandated by the decisions of the Supreme Court of Missouri [in *State v. Harris*, 547 S.W.2d 473 (Mo. banc 1977); *State v. Hawkins*, 418 S.W.2d 921 (Mo. banc 1967); *State v. Tettamble*, 450 S.W.2d 191 (Mo. 1970); *State v. Garrett*, 416 S.W.2d 116 (Mo. 1967); *State v. Deutschmann*, 392 S.W.2d 279 (Mo. 1965)]." *Id.* at

¹⁷ Ante. at 18 n.11.

¹⁸ On September 8th of this year the Missouri Supreme Court will hear arguments on the application of the Double Jeopardy Clause to enhanced sentencing trials on remand. *State v. Cobb*, appeal docketed No. 75685 and *State v. Simmons*, appeal docketed No. 75839.

400. The state appellate court should not have been constrained and confined to state supreme court precedents that were decided before this Court's holding in *Bullington*. Under such reasoning, the state appellate court could have believed it could base its decision on the initial holding in *State ex rel. Westfall v. Mason*, 494 S.W.2d 908 (1980), and simply overlook this Court's intervening reversal of that decision.

The only facts that differentiate *Bullington*'s sentencing trial from *Bohlen*'s is the possible outcome, death or life imprisonment, as opposed to imprisonment for a term of years; and the possibility of a jury rather than judge-made fact determination.¹⁹

"When a decision of this Court merely has applied settled precedents to new and different factual situations, no real question [of retroactivity] has arisen. . . . In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

Butler v. McKellar, 494 U.S. 407, 425 (Brennan, J., dissenting) (quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)). Just as the minor differences in the capital sentencing system in Mississippi from the capital-sentencing system in Georgia "could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final," so too the differences in *Bullington*'s and *Bohlen*'s sentencing trial did not justify the state court's denial of the requested relief. Just as "the application of the *Godfrey* principle to the Mississippi sentencing process follows,

¹⁹ The Double Jeopardy Clause applies whether the ultimate decision of fact is made by a judge or jury. See *United States v. Wilson*, 420 U.S. at 365 ("Since the double jeopardy clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that clause apply to cases tried to a judge.")

a fortiori . . ." *Stringer v. Black*, 112 S. Ct. 1130, 1136 (1992), the application of the principle in *Bullington* to *Bohlen*'s sentencing is the only appropriate result.

Since 1982 *Bullington* has been applied to non-capital sentencing trials on collateral reviews in various federal courts. See, e.g., *Bullard v. Estelle*, 665 F.2d 1347, 1360 (5th Cir. 1982), *vacated on other grounds*, 459 U.S. 1139 (1983); *French v. Estelle*, 692 F.2d 1021, 1025 (5th Cir. 1982) *cert. denied*, 461 U.S. 937 (1983); *Briggs v. Procunier*, 764 F.2d 368, 373 (5th Cir. 1985); *Nelson v. Lockhart*, 828 F.2d 446, 449 (8th Cir. 1987) *reversed on other grounds*, 488 U.S. 33 (1988);²⁰ *Durosko v. Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1930 (1990).

Even if this Court were to decide that the decision in the court below was not dictated by *Bullington*, and as such is a "new rule", *Bohlen* is entitled to relief because the decision is encompassed by the two exceptions enunciated in *Teague*, 489 U.S. at 311-313 (plurality opinion):

"The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to prescribe, [citation omitted] or addresses a 'substantive categorical guarante[e] accorded by the Constitution' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"

Graham v. Collins, 113 S. Ct. 892 (1993) (quoting *Saffle v. Parks*, 494 U.S. at 494, quoting *Penry*, 492 U.S. at 329-330); see also *Butler v. McKellar*, 494 U.S. at 415.

²⁰ In *Lockhart* the State of Arkansas, Amicus in this case, did not contest the application of the holding in *Bullington* to non-capital sentencing enhancement trials. *Lockhart v. Nelson*, 430 U.S. 33, 37 n.6.

As the Court explained in *Penry*:

[A] new rule placing a certain class of individuals beyond the State's power to punish . . . is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."

Penry, 492 U.S. at 330; see also *Butler v. McKellar*, 494 U.S. at 415, (The first *Teague* exception encompasses "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders."); *McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991) vacated on other grounds, 112 S. Ct. 1658 (1992) on remand 975 F.2d 437 (1992), petition for cert. filed 61 U.S.L.W. 3653 (U.S. March 10, 1993) (No. 92-1465).

"[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" *Benton v. Maryland*, 395 U.S. 784, 794 (1969) and a "basic constitutional guarantee". *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). The Clause operates on an elemental level and when properly invoked no trial can take place. See *Robinson v. Neil*, 409 U.S. 505, 509 (1973). "Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction." *McIntyre v. Trickey*, 938 F.2d at 904; see also *Johnson v. Howard*, 963 F.2d 342, 345 (11th Cir. 1992). As Bohlen was "acquitted" at his first trial, he is forever insulated and thus ineligible for persistent offender status on this case.

Respondent also can claim protection from *Teague*'s mandated dismissal under its second exception which al-

lows application of a new rule on collateral review "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Butler v. McKellar*, 494 U.S. 407, 416 (1990).

This second test has been limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. As already stated, the Double Jeopardy Clause has always been considered a bedrock procedural protection implicit in the concept of ordered liberty. *Crist v. Betz*, 438 U.S. 28, 33 n.8 (1978) (quoting 4 BLACKSTONE, COMMENTARIES *335) (It has long been considered a "universal maxim . . . that no man is to be brought into jeopardy of his life, more than once, for the same offense."). Accuracy and reliability have been repeatedly expressed as a concern underlying the purpose and interpretation of the Double Jeopardy Clause.²¹ Allowing the State to repeatedly attempt to make its case, each time patching any holes in its previous performance, would forever jeopardize the reliability of each retrial and any resultant conviction.

²¹ "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-188 (emphasis added); *United States v. Wilson*, 420 U.S. 322, 343 (1975); *Scott*, 437 U.S. at 91; *Bullington v. Missouri*, 451 U.S. at 445; *Poland v. Arizona*, 476 U.S. at 156; see also *Arizona v. Washington*, 434 U.S. at 503-504 ("[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.") (footnote omitted); *Tibbs v. Florida*, 457 U.S. at 41 ("Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perserverance.").

III. PETITIONER AND AMICI HAVE ESTABLISHED NO REASON SUFFICIENT TO JUSTIFY OVERRULING *BULLINGTON v. MISSOURI*

In the twelve years since *Bullington* was decided, this Court has thrice been petitioned to reverse its holding and return to the death penalty jurisprudence that existed in 1919. Two of the three occasions involved direct frontal assaults—death penalty cases that presented many of the same issues that enveloped Robert Bullington. This third attack comes from the flanks.

In *Arizona v. Rumsey*, 467 U.S. 203 (1983), seven of the justices declined the invitation to depart from the doctrine of *stare decisis* because “no reason [had been suggested] sufficient to warrant our taking [that] exceptional action. . . .” *Id.* at 212. (emphasis added.)

Again, in 1986, in *Poland v. Arizona*, 476 U.S. 147 (1986), the Court had the option of overturning the *Bullington* decision but instead distinguished Poland’s situation from Bullington’s, leaving the Court’s holding in *Bullington* intact.

The very core of *Bullington*, fundamental to the application of the Double Jeopardy Clause, was that the factfinder in *Bullington* had rejected the state’s case for death and “ha[d] . . . acquitted the defendant of whatever was necessary to impose [that sentence].” *Bullington* 451 U.S. at 445, (quoting *State ex rel. Westfall v. Mason*, 594 S.W.2d at 922 (Bardgett, J., dissenting)).

The situation in *Poland*, by contrast, was the polar opposite. Whereas Bullington’s status as death-eligible had been decided in his favor, the factfinder and sentencer in *Poland*’s case had found that the death penalty [was] appropriate.” *Poland v. Arizona*, 476 U.S. at 155 (emphasis in original). It is this status determination of eligibility that distinguishes *Poland* from *Bullington* and *Bohlen*.

Bohlen’s appeal to this Court should be clear-cut; his case has none of the side issues that impacted on *Bullington*. There are no Eighth Amendment issues that have infused this Court’s death penalty jurisprudence since *Trop v. Dulles*, 356 U.S. 86 (1958); see Argument ante at 33-36. Although Respondent’s sentence was severe “from the point of view of the defendant, [a sentence of death] is different both in its severity and its finality.” *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) (plurality opinion). Indeed since *Furman* the Court has consistently and continually echoed its findings that

‘the penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. . . . [A]nd it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity.’

Furman v. Georgia, 408 U.S. 238, 306 (1976) (Stewart, J. concurring). For Respondent the result was critical, for Bullington the result could have been fatal.

Petitioner and Amici, despite considerable rhetoric, are unable to identify those factors routinely examined when this Court considers overruling one of its precedents.

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition indispensable. See Powell, *Stare Decisis and Judicial Restraint*, 1991 *Journal of Supreme Court History* 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992) (lead opinion).

Planned Parenthood v. Casey, 112 S. Ct. at 2808, identified the catalysts that have compelled this Court to overrule its precedents. None of these are sufficiently advanced in this case to justify such a drastic and unnecessary step:

"WHETHER THE RULE HAS PROVED TO BE INTOLERABLE SIMPLY IN DEFYING PRACTICAL WORKABILITY";

There is nothing unworkable in the implementation of the standards set forth in *Bullington*. See, e.g., *United States v. Dixon*, 113 S. Ct. at 2863 (*Dixon* overruled *Grady v. Corbin*, 495 U.S. 508 (1990), in part because in the three years since *Grady* was announced it "ha[d] already proved unstable in application" and "produced confusion.") If anything, *Bullington* represents a simple, straightforward, bright-line approach to a complex problem. As in all cases of acquittal, if the capital defendant is not found to be death-eligible by the sentencing factfinder, or if a reviewing court determines that there was insufficient evidence to support such a finding, the State with all its resources and power cannot repeatedly return to court in an effort to prove its once-failed case. Petitioner and Amici suggest no reason to conclude that the application of *Bullington* to presentence trial-like hearings that require proof of the necessary elements of eligibility beyond a reasonable doubt is unworkable or confusing.

"WHETHER THE RULE IS SUBJECT TO A KIND OF RELIANCE THAT WOULD LEND A SPECIAL HARDSHIP TO THE CONSEQUENCES OF OVERRULING AND ADD INEQUITY TO THE COST OF REPUDIATION";

Any defendant presently appealing a conviction in a capital case wherein his life was spared would necessarily rely on this Court's ruling in *Bullington*. He would have

every reason to believe that if his conviction were overturned because he had received an unfair trial, he could not be compelled to risk death with yet another run through the gantlet. In such cases, if the State wished to bolster its case and take a second "crack" at the defendant, the prosecutor could simply confess a defendant's claim on appeal or in post-trial motions. A defendant caught in this predicament would be forced to forego his right to appeal from an erroneous conviction or risk affording the State yet another opportunity at her life.²² "The law should not . . . place [a] defendant in such an incredible dilemma." *Green v. United States*, 355 U.S. at 227. Allowing the State an infinite number of opportunities to make its case for death also would invite prosecutorial overreaching at trial. A prosecutor, faced with what he believes to be an unsympathetic jury, or beleaguered by unfavorable pre-trial rulings, could be inclined to "push the envelope" of efficacy at trial believing that any resultant reversal would simply give him another opportunity for a more favorable setting.

"WHETHER RELATED PRINCIPLES OF LAW HAVE SO FAR DEVELOPED AS TO HAVE LEFT THE OLD RULE NO MORE THAN A REMNANT OF ABANDONED DOCTRINE."

Petitioner and Amici have not suggested that *Bullington* has been abandoned. On the contrary the Petitioner's and Amici's complaint is that its holding is routinely and regularly applied in all the states that authorize capital punishment. Its principles have not been abandoned or diluted. *Bullington* remains as viable today as when decided. Petitioner and Amici argue this Court should simply erase *Bullington* from the judicial landscape and apply

²² At least one commentator has suggested that a penalty retrial of a defendant who has secured a life sentence at his first trial would unconstitutionally chill his right to appeal. Bennet, *Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor*, 19 N.M.L. Rev. 451, 466-479, 485-488 (1989).

the holdings of those cases it distinguished in its stead. The issues decided in *Pearce* and *Chaffin*, and presented in this case did not then and do not now present the Court with the enormities of forcing a capital defendant to stand trial for his life a second time after having convinced the sentencer beyond a reasonable doubt at a previous sentencing trial to reject the State's case for death. For *Pearce*, *Chaffin*, and *Bohlen* the increased sentencing exposure at their second trials meant additional years in prison but because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), the stakes for a capital defendant defy comparison. Obviously, being compelled to defend against the death penalty a second time subjects the defendant to a unique degree of "personal strain, public embarrassment and expense,"²³ of "heavy pressures and burdens—psychological, physical and financial,"²⁴ and of "embarrassment expense and ordeal . . . compelling him to live in a continuing state of anxiety and insecurity. . . ." ²⁵ Where the defendant has already persuaded the factfinder at an earlier sentencing trial to return a verdict against death, forcing him to endure a second capital trial is nothing short of monstrous:

Such a prosecution . . . [is] cruel and inhuman, imposing on the accused a "hardship so acute and shocking that our policy will not endure it." *Palko v. State of Connecticut*, 302 U.S. 328. . .

United States ex rel. Hetenyi v. Wilkins, 348 F.2d at 857.

There are a myriad of reasons²⁶ to suggest that the State should not and need not have an infinite number of

²³ *Abney v. United States*, 431 U.S. 651, 661 (1977).

²⁴ *Breed v. Jones*, 421 U.S. 519, 530 (1975).

²⁵ *Green*, 355 U.S. at 187-188.

²⁶ For example: If prosecutors are permitted to seek the death penalty at capital retrials, when the government has failed to make

opportunities to try to convince a judge or jury that a defendant should die for his crime. None of those concerns exist for Respondent, they do not impact upon him or on his interest in finality and repose. If Amici seek the vehicle for overturning *Bullington* it should be driven by the same concerns that motivated *Bullington* and others that face repeated efforts by the State to force them back into the storm to see whether they might the next time be "struck by lightning." *Furman v. Georgia*, 408 U.S. at 309.

The impact of this Court's ruling in capital cases often is literally the difference between life and death for those facing trials or pursuing appeals in capital cases. The doctrine of stare decisis has no more important application than when applied under these circumstances. "The promise of constancy, once given binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Planned Parenthood v. Casey*, 112 S. Ct. at 2815. It is precisely this "promise of constancy that those whose convictions have been or potentially could be reversed will be denied.

its case for life at the first trial, a defendant will have the option of avoiding a death sentencing by waiving his Sixth Amendment right to a trial by jury. Under this Court's decision in *North Carolina v. Pearce*, 395 U.S. at 726, a judge is flatly prohibited from imposing a sentence more severe than the one meted out at the first trial, unless there are reasons for a higher sentence "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding."

Missouri law permits judicial capital sentencing in "cases tried before a judge." Mo. Rev. Stat. § 565.006.2 (1978). Hence, to come within the protective pnumbra of *Pearce* a defendant must waive his right to a jury not only at the sentencing phase but also at the guilt trial. Under *Jackson v. United States*, 390 U.S. 570 (1968), the state may not constitutionally subject Petitioner to such a choice.

Once again those seeking *Bullington's* demise have failed to advance sufficient reasons to warrant this Court taking the "exceptional action" of overruling it.

CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment prohibits successive attempts by the State of Missouri to prove Respondent's status as a repeat offender when at his first trial the State failed to introduce sufficient evidence to merit such a finding. The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

RICHARD H. SINDEL
(Counsel of Record)
SINDEL & SINDEL, P.C.
8008 Carondelet, Suite 301
St. Louis, Missouri 63105
(314) 721-6040
Counsel for Respondent

APPENDIX

APPENDIX

REVISED STATUTES OF MISSOURI, 1978 -

565.001. Capital murder defined.—Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered—finding of guilty, effect of—presentence hearing, admissible evidence—penalty, when imposed—reversible error, effect of—1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nol contendere of the defendant, or the absence of any such prior criminal convictions and

pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.—1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death,

shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

557.036. Role of court and jury in sentencing—jury informed penalties.—1. Subject to the limitation provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt, or

(2) The state pleads and proves the defendant is a prior offender, persistent offender, or dangerous offender, as defined in section 558.016, RSMo.

If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this

section, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

4. If the defendant is found to be a prior offender, persistent offender, or dangerous offender as defined in section 558.016, RSMo:

(1) If he has been found guilty of a class B, C, or D felony, the court shall proceed as provided in section 558.016, RSMo., or

(2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony.

5. The court shall not seek an advisory verdict from the jury in cases of prior offenders, persistent offenders, or dangerous offenders; if an advisory verdict is rendered, the court shall not deem it advisory, but shall consider it as mere surplusage.